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No. 03-5554

In The
Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF OF THE CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to stop individuals who do not wish to be stopped and to demand answers from individuals who do not wish to speak, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE[2]

On the evening of May 21, 2000, a bystander called the Humboldt County Sheriff's Office in Winnemucca, Nevada to report that the driver of a pick-up truck was

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

[2] This statement of facts is based upon Patrol Deputy Lee Dove's trial testimony given February 13, 2001, in the Justices' Court of Union Township, Nevada.

hitting his female passenger. When Patrol Deputy Lee Dove responded, the reporting party directed him to a truck parked on the side of Grass Valley Road. Larry Hiibel was standing outside the truck. Deputy Dove asked Mr. Hiibel several times to identify himself, but Mr. Hiibel chose to remain silent. Because Mr. Hiibel refused to "cooperate" by identifying himself, Deputy Dove placed him in handcuffs and transported him to jail. Deputy Dove testified that because Mr. Hiibel had "potentially" committed a crime, he was legally required to identify himself pursuant to NRS § 171.123(3). Because Mr. Hiibel remained silent instead, he was charged with, and ultimately convicted of, delaying an officer under NRS § 199.280. Specifically, the trial court held that "Deputy Dove acted properly and lawfully when he asked [Mr. Hiibel] for identification and subsequently arrested him for refusing. . . ." Mr. Hiibel was never tried on any other charge.[3]

The Supreme Court of Nevada, in a 4-3 opinion, held that it is constitutional to arrest a person for exercising his right to remain silent by refusing to identify himself. *Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201 (Nev. 2002). The three dissenting justices observed that "being forced to identify oneself to a police officer or else face arrest is government coercion – precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent." *Id.* at 1209 (Agosti, J., with whom Shearing and Rose, JJ., join, dissenting).

[3] Nevada dismissed a domestic battery charge against Mr. Hiibel. *See Hiibel v. Sixth Judicial District Court*, 59 P.2d 1201, 1203, n.1 (Nev. 2002). No other charges were ever brought.

SUMMARY OF ARGUMENT

On first blush, the arrest of Larry Hiibel appears to be a petty matter, but this case actually raises profound questions regarding the power of government and the constitutional rights of the citizenry.

If citizens have the right to voluntarily engage in conversations with police officers (and they assuredly do), they must also retain the option of declining to engage in such conversations – especially when law enforcement agents are employing interrogation tactics that are purposely designed to have the citizen waive his right to reject a consensual stop or search or his right to silence.

If the government can criminalize citizen silence, citizens will no longer be able to rely upon their own wits when they find themselves confronted with law enforcement agents. There would simply be too much legal jeopardy: if self-incrimination, false statements, and simple silence can be jailable offenses, citizens will become totally dependent upon members of the legal profession to defend and vindicate their legal rights. And since attorneys are typically not on the scene as the events are unfolding, the rights of the citizenry will be trampled month to month, year to year – as only a few will seek out an attorney after-the-fact and file a lawsuit. This Court must recognize that such after-the-fact avenues of legal relief, at least in the context of citizen-cop street encounters, are woefully inadequate. This case provides the Court with an opportunity to declare a clear, simple and just rule of law: an American citizen cannot lose his liberty for simply declining to speak with a police officer. Any other rule will dilute the constitutional rights of all citizens, complicate the law, and spawn still more litigation.

ARGUMENT

I. IF GOVERNMENT AGENTS HAVE THE POWER TO ACTIVELY SEEK CONSENSUAL STOPS AND SEARCHES, THEN CITIZENS CANNOT BE ARRESTED FOR DECLINING SUCH INVITATIONS OR OTHERWISE ENGAGING IN PEACEFUL NONCOOPERATION.

History shows that from time to time government officials become so zealous in their desire to carry out their responsibilities that they not only come to *want* the full cooperation of citizen-suspects and citizen-witnesses, but they go so far as to *demand* it. And when such demands are resisted, there is a tendency for those in authority to overreact and to misperceive the entire affair as an instance of "obstruction of justice" or "interfering with a police officer" or "disorderly conduct." It is the duty of the judiciary to scrutinize such claims of "criminality" to determine whether the underlying conduct of the citizen truly interfered with a government agent in the performance of his duty – or whether the conduct merely displeased the agent.

When Geraldine Little stood on her Fourth Amendment rights and refused to allow a City Health official into her home without a warrant, she was arrested for "hindering" and "interfering" with an inspector in the performance of his duty. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd* 339 U.S. 1 (1950). In reversing her conviction, the court noted that constitutional guarantees can be invoked not only against "malevolent and arrogant agents," but "wise and benign officials" as well. *Id.* at 17. The court also observed that it was immaterial whether the demand for entrance was "motivated by the highest public purpose or by the lowest personal spite." *Id.*

When Evelyn Miller stood on her Fourth Amendment rights and refused to allow a U.S. Marshal into her home without a search warrant, federal prosecutors charged her with "obstruction of justice." *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956). In reversing her conviction, the court noted that Miller "asserted a right which was hers, and which none could take away. That it . . . subjected the officers to the inconvenience of getting a lawful writ, neither detracts from this right nor subjects her to a crime for having asserted it." *Id.* at 489-490.

When Albert Tinston refused to identify himself to plainclothes officers who accosted him on the street, he was arrested for "disorderly conduct." *People v. Tinston*, 163 N.Y.S.2d 554 (N.Y. Mag. Ct. 1957). In reversing his conviction, the court noted that Mr. Tinston "could hardly have employed a milder form of resistance to 'prevent an offense against his person.'" *Id.* at 559.

When Samuel King stood on his Fourth Amendment rights and told two deputy sheriffs to leave his property, he was arrested for "obstructing justice." *King v. State*, 149 So.2d 482 (Miss. 1963). In reversing his conviction, the court noted that since there was nothing in the record to justify the invasion of King's property, he was within his rights in treating the police officers as "trespassers." *Id.* at 483.

When Norman See stood on his Fourth Amendment rights and refused to allow city officials to search his warehouse without a warrant, he was prosecuted and fined. *See v. City of Seattle*, 387 U.S. 541 (1967). In reversing his conviction, this Court wrote that Mr. See could not "be prosecuted for exercising his constitutional right." *Id.* at 546.

When Delores Strange stood on her Fourth Amendment rights and refused to allow police officers to search the bedrooms of her home, she was arrested for "interfering" with the police. *Strange v. City of Tuscaloosa*, 652 So.2d 773 (Ala. Crim. App. 1994). In reversing her conviction, the court noted that the warrantless entry into the home violated her constitutional rights. Thus, "her actions to prohibit the entry and search cannot subject her to a criminal conviction for interfering with police officers." *Id.* at 776.

When Mary Ann and James Stumbo stood upon their Fourth Amendment rights and refused to allow a social worker into their home to interrogate their children, a court order (carrying criminal penalties) was issued. *In re Stumbo*, 582 S.E.2d 255 (N.C. 2003). That order instructed the Stumbos to not "obstruct" or "interfere" with the investigation. On appeal, the Supreme Court of North Carolina determined that it was the social worker's demands, not the conduct of the Stumbos, that were unlawful. *Id.*

Geraldine Little, Evelyn Miller, Albert Tinston, Samuel King, Norman See, Delores Strange, and Mary-Ann and James Stumbo could have acquiesced to the authorities with whom they were confronted, but instead they resisted by standing upon their constitutional rights. Initially, the government perceived the invocation of their rights as criminal behavior – it was only later that those rights were vindicated by the courts. In this case, Deputy Dove did his best to elicit a "voluntary" statement from Mr. Hiibel. For better or worse, that plan failed when Mr.

Hiibel exercised his right to remain silent and his "right not to cooperate." *United States v. Drayton*, 536 U.S. 194, 197 (2002).[4] By criminalizing citizen silence in these circumstances, Nevada has unconstitutionally burdened the right of citizens to withhold consent from agents who are aggressively seeking to secure citizen consent in order to justify stops and searches.[5]

II. IF GOVERNMENT AGENTS HAVE THE POWER TO ACTIVELY SEEK CONSENSUAL CONVERSATIONS WITH CITIZENS IN ORDER TO SECURE ADMISSIONS AND CONFESSIONS, THEN CITIZENS CANNOT BE ARRESTED FOR DECLINING SUCH INVITATIONS OR OTHERWISE ENGAGING IN PEACEFUL NONCOOPERATION.

In *Terry v. Ohio*, 392 U.S. 1 (1968), Justice White was undoubtedly correct when he observed that

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[4] In recent years police agencies have been employing a new tactic that has come to be called "Knock and Talk." *See, e.g., Scott v. Maryland*, 782 A.2d 862 (Md. 2001). The basic idea is to knock on the door of people's homes, engage them in conversation, and to try mightily to obtain consent for searches of those homes. This tactic is consistent with the constitutional rights of the citizenry – so long as this Court makes it plain that homeowners cannot face "obstruction of justice" charges for remaining silent or for peacefully closing their doors to uninvited government agents.

[5] Note that the claim that there is no "constitutional right to anonymity" only serves to obfuscate the issues at stake in this case. This claim is akin to arguing that the Constitution does not mention a "right to decline association with unwanted persons" (*but see Boy Scouts of America v. Dale*, 530 U.S. 640, 648-649 (2000) ("Government actions that may unconstitutionally burden [the freedom of association] may take many forms")) or a judicial hearing within forty-eight hours of an arrest (*but see County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."

Id. at 34 (White, J., concurring). It is also undoubtedly true that the police can exploit any inculpatory utterance elicited from a citizen as a legal justification to augment his authority, such as by (a) detaining the citizen against his will; (b) frisking the citizen's clothes; or (c) conducting a full blown custodial arrest. *See, e.g., Grant v. State*, 461 A.2d 524 (Md. Ct. Spec. App. 1983). After all, if a police officer is walking the beat and asks a passerby if he has any "guns or drugs on his person,"[6] and the citizen replies "Well, I do have some cocaine right here in my coat," such an admission would furnish the police with a sufficient legal basis to search that coat and, if the cocaine is indeed found, to arrest that person. In other situations, the police may be able to secure admissions, such as a citizen's whereabouts at a critical time, and so forth. Under the law, then, the police can ask questions and citizens can certainly elect to answer those questions. This case raises the question as to whether a citizen can elect to resist entreaties by the police by remaining silent or otherwise engaging in peaceful noncooperation. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise

[6] Cf. *Ohio v. Robinette*, 519 U.S. 33 (1996) (police officer poses similar question to citizen).

of his own will, and to suffer no penalty . . . for such silence.")

History has shown that the government has attempted to establish precedents that will unconstitutionally burden the right of the citizen to choose silence in the face of questions posed by agents. For example, in *United States v. Di Re*, 332 U.S. 581, 594-95 (1948), prosecutors maintained that the police could infer probable cause of criminality from the fact that a citizen did not angrily protest his arrest and "did not at once assert his innocence." In *State v. Espinoza*, 641 N.W.2d 484 (Wis. Ct. App. 2002), prosecutors maintained that the police could prosecute a citizen for "obstruction of justice" because the citizen asserted his innocence and affirmatively denied his involvement in criminal activity. Overzealous prosecutors may believe that confessions are the only appropriate response to police questioning, but that is not the only prerogative under the American Constitution.[7]

Before this Court analyzes the constitutional issue in this case, it would be useful to begin with a restatement of certain propositions that are not in dispute. First, this Court has determined that the police can actively question citizens during "voluntary encounters" and "*Terry* stops." (*See Drayton; Terry v. Ohio*, 392 U.S. 1 (1968)). Second, the law also allows police officers to use various forms of trickery and deception to elicit statements from citizens who fall under suspicion. (*See, e.g., Illinois v. Perkins*, 496

[7] *See generally State v. Hamilton*, 356 N.W.2d 169 (Wis. 1984); *State v. Hauan*, 361 N.W.2d 336, 340-41 (Iowa Ct. App. 1984); *Enright v. Groves*, 560 P.2d 851 (Colo. Ct. App. 1977).

U.S. 292, 297-98 (1990); *State v. Barnes*, 572 S.E.2d 165 (N.C. Ct. App. 2002)). Third, an inculpatory statement or admission can be used against the person who makes it, and a false statement can lead to legal jeopardy, as well. (*See, e.g.*, 18 U.S.C.A. § 1001; Ga. Code Ann. § 16-10-20; Md. Code Ann., Crim. Law § 9-503). Fourth, *Miranda* warnings are not required during *Terry* stops. (*See, e.g., United States v. McGauley*, 786 F.2d 888, 890 (8th Cir. 1986)). Fifth, citizens have no constitutional right to know the identity of the government agents with whom they are confronted. (*Cf. Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).[8] Be that as it may, but now the State of Nevada has created legal jeopardy for citizens who simply elect to maintain silence. The constitutional problem here is very similar to the one that this Court noted in *Chavez v. Martinez*, 123 S. Ct. 1994, 2003-04 (2003), namely, "that if the privilege cannot be asserted in these situations, any statements [will] be deemed 'voluntary.'" Thus, the criminalization of the right to silence in these circumstances constitutes an unconstitutional burden upon the right against self-incrimination.[9]

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[8] When unidentified government agents act lawlessly, such as when a plainclothes officer conducts an illegal *Terry* stop, the citizen is obviously at a distinct disadvantage in obtaining any legal remedy. It is even worse when government agents misrepresent their identity. *See, e.g.*, Joel Berger, "The Police Misconduct We Never See," *New York Times*, February 9, 1999.

[9] Note also how the Nevada statute works in combination with the legal doctrine of search incident to arrest. The Nevada statute presents citizens with the Hobson's choice of "choos[ing] between forgoing their right to remain silent and forgoing their right not to be searched if they choose to remain silent." *Michigan v. DeFillippo*, 443 U.S. 31, 46 (1979) (Brennan, J., with whom Marshall and Stevens, JJ., join dissenting).

It should be noted that when a petitioner advanced an argument in this Court just a few years ago that persons who are under investigation might be unaware of their right to remain silent, this Court declared such a notion to be "implausible." *Brogan v. United States*, 522 U.S. 398, 405 (1998). In the circumstances of this case, the citizen was aware of his right to remain silent, but when he invoked it, the police placed him under arrest and took him to jail. Quite obviously, "the right to remain silent" is under a cloud, to say the least, in some jurisdictions.

III. IT IS PERVERSE TO REASON THAT THE CONSTITUTIONAL RIGHTS OF THE CITIZENRY MUST DISSIPATE ALONG WITH THE QUANTUM OF INCRIMINATING EVIDENCE IN THE POSSESSION OF THE GOVERNMENT.

The Nevada law under which Mr. Hiibel was prosecuted imposes a duty upon persons who are "stopped under reasonable suspicion by a police officer." When that legal duty is examined in the broader context of this Court's case law, it becomes apparent that its enforcement will only produce absurd results.

Consider that even if police detectives are able to convince a judicial officer to issue an arrest warrant because the police have done excellent investigative work and have probable cause to believe that a certain citizen has committed an offense, that citizen, upon his arrest, not only has the right to ignore questions posed by the arresting detectives and to remain silent, the police have an *affirmative obligation to warn the arrestee of his right to remain silent*. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Dickerson v. United States*, 530 U.S. 428 (2000).

Consider that even after the police and prosecutors are able to convince an impartial jury to convict a citizen of a criminal offense by presenting overwhelming evidence of guilt, that citizen-defendant *still* retains the right to remain silent during the sentencing phase of the criminal case. *See Mitchell v. United States*, 526 U.S. 314 (1999).

But now consider that in Nevada citizens are stripped of the right to remain silent when the government has a much lower quantum of incriminating evidence in its possession, that is, reasonable suspicion alone. Because of the limited coverage of the Nevada statute, citizens who do not fall under the reasonable suspicion of a police officer can still decline to identify themselves to police detectives without any threat of arrest and jail time. Are Nevada officials prepared to argue that that circumstance is simply a matter of legislative forbearance? Are Nevada officials prepared to argue that the legislature can revise the law so that the police can demand answers from any person who is *not under arrest*?[10] To paraphrase Judge Prettyman, To say that a citizen who is suspected of a crime has a right to remain silent, but that a citizen who is not suspected of a crime has no such right is a fantastic absurdity. *See District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949) (opinion of Prettyman).

The Supreme Court of West Virginia recently identified a related fallacy with respect to the First Amendment

[10] Nevada seems to suggest this in its brief to the Sixth Judicial Court below, contending that Mr. Hiibel's Fifth Amendment right "only applies once an individual is placed into custody." Respondent's Answering Brief in the Sixth Judicial District Court of the State of Nevada in and for the County of Humboldt, May 9, 2001, at 2.

issues that are lurking in the background of these criminalization-of-silence cases. When Brian Srnsky declined to identify himself to a police officer, he was arrested and prosecuted for "obstructing a law enforcement officer." In reversing his conviction, the court noted that if citizens have the right to peacefully remonstrate with an officer while he is performing his duty, "it stands to reason that silence *alone* cannot establish the [obstruction] offense." *State v. Srnsky*, 582 S.E.2d 859, 868 (W. Va. 2003) (emphasis in original).

IV. THE RIGHT TO REMAIN SILENT IS A SIMPLE, JUST, CONSTITUTIONAL RULE. ANY OTHER RULE WILL COMPLICATE THE LAW AND SPAWN MORE LITIGATION.

There are at least three additional problems with the legal claim that is being advanced by Nevada's prosecuting authorities. First, there is no indication in the record that Deputy Dove warned Mr. Hiibel that he was no longer *requesting* identification, but that he was *demanding* identification. This is a critical point because, under this Court's case law, Mr. Hiibel could have reasonably believed that he was involved in a "voluntary encounter" with a police officer and could therefore decline to answer questions or even walk away. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("[N]o seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search . . . so long as the officers do not convey a message that compliance with their requests is required.") Absent a formal warning, how was Mr. Hiibel to know precisely when his exchange with Deputy Dove ripened into a "*Terry* stop," thus triggering his legal duty under the Nevada statute to identify himself

to the police? In *Kolender v. Lawson*, 461 U.S. 352 (1983), this Court reaffirmed the proposition that penal statutes must define the criminal offense with sufficient definiteness that "ordinary people can understand what conduct is prohibited." *Id.* at 357. The Nevada statute does not meet that standard.

Second, if police officers can arrest people for standing on their right to silence, the line between a lawful, "black letter" *Terry* stop and an illegal detention will mean virtually nothing to one class of people: innocent people who have done absolutely nothing wrong.[11] If innocent persons can no longer avoid arrest by remaining peacefully silent, the only remaining options are to actively resist and risk both physical retaliation by police officers and "obstruction of justice" charges (*see, e.g., East Brunswick v. Malfitano*, 260 A.2d 862 (N.J. Super. Ct. App. Div. 1970)) or acquiesce on the scene and then seek out an attorney, after-the-fact, to pursue legal redress.[12] How many innocent people who find themselves illegally frisked and illegally detained for an hour or two will want to file a lawsuit?[13] Even if legal consultation is sought, how many

[11] Note that wrongdoers will typically be prosecuted and the judiciary will still invalidate illegal arrests, suppress statements, and so forth.

[12] *See State v. Hobson*, 577 N.W. 2d 825, 841 (Wis. 1998) (Abrahamson, C.J., concurring) (noting the inadequate nature of after-the-fact relief); *State v. Bradshaw*, 541 P.2d 800, 803-04 (Utah 1975) (Henriod, C.J., concurring) (damages are "no substitute for loss of freedom").

[13] In the late 1990s, New York City's Street Crimes Unit conducted scores of petty, but nonetheless illegal, arrests. *See* Lynch, "We Own the Night: Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit," Cato Institute Briefing Paper, No. 56 (March 31, 2000).

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attorneys would advise a client to proceed, given the case law? *See, e.g., Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003) (detention and search were illegal, but agents held immune from suit); *Henes v. Morrissey*, 533 N.W.2d 802 (Wis. 1995) (arrest was illegal, but agents held immune from suit).

To keep the line between a lawful *Terry* stop and an illegal detention from evaporating for innocent and peaceful people who simply wish to stand on their rights under the law, this Court should not deprive the citizenry of a simple and traditional maneuver that they might invoke then and there, on-the-spot, as the critical events are unfolding – namely, maintaining their silence. Of course, there is no guarantee that every government agent will honor the limits of his authority in every situation, but if this Court makes it clear that citizen silence is something that the law honors, the number of abuses can certainly be minimized.

Third, sustaining the constitutionality of the Nevada statute at issue in this case will complicate the law and spawn still more litigation. Nevada requires citizens to identify themselves to police officers and other states have similar statutory provisions. Vermont, for example, provides that a person who "refuses to identify himself . . . satisfactorily to a police officer . . . shall forthwith be brought before a district court judge . . . " Vt. Stat. Ann. Tit. 24 § 1983. It is important to note, however, that numerous states have authorized their police agents to

See also "NYPD Hit on Stop and Frisk Report," *Daily News* (New York), December 1, 1999.

demand not just a person's name, but his address, destination, and/or an explanation of his actions as well. *See* Appendix (collecting representative statutes impacting the right to remain silent). Massachusetts, for example, provides that persons "who do not give a satisfactory account of themselves" may be arrested on the spot. Mass. Gen. Laws, ch. 41, § 98. Since it seems arbitrary to draw a constitutional distinction between a statute that compels a person to surrender his identity and a statute that compels a person to surrender both his name *and* address, destination, or explanation of his conduct, the lower courts are likely to split on questions concerning the constitutionally permissible amount of information police officers can properly compel from citizens during *Terry* stops.

Finally, this Court should note the cumulative effect that the patchwork of state, county, and local ordinances will have upon the right to remain silent. Justice Robert Jackson once remarked that "Any lawyer worth his salt will tell suspects in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part). If the Nevada statute (and others like it) are sustained, such advice will no longer be sound.

Indeed, this Court has been properly sympathetic to the predicament of police agents who are sometimes expected to apply uncertain legal rules in fast-moving street situations (*See Berkemer v. McCarty*, 468 U.S. 420, 431, n.13 (1984) ("Officers in the field frequently have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person.") (internal quotation marks and citations omitted), but this Court also has an obligation to

be sensitive to the plight of citizens who wish to stand upon their rights under the law in unexpected and sometimes heated circumstances.[14] *Coolidge v. New Hampshire*, 403 U.S. 443, 445 (1971) ("It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.") (quotation and citation omitted). A layperson can comprehend a ruling that secures a simple right to remain silent. But if that right is riddled with loopholes (e.g. you have the right to remain silent in this jurisdiction, but must give your name to the police in that one, and your name *and address* in yet another), citizens will become both docile and dependent upon members of the legal profession to protect their rights after-the-fact. And after-the-fact remedies will undermine the safeguards in the Fourth and Fifth Amendments, compromise individual liberty, complicate the law, and spawn still more litigation.

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[14] Cf. *Michigan v. DeFillippo*, 443 U.S. 31, 43, n.1 (1979) (Brennan, J., with whom Marshall and Stevens, JJ., join, dissenting) ("For if it is unfair to penalize a police officer for actions undertaken pursuant to a good-faith, though mistaken, interpretation of the Constitution, then surely it is unfair to penalize respondent for actions undertaken pursuant to a good-faith and *correct* interpretation of the Constitution.").

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted,

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APPENDIX

REPRESENTATIVE STATE, TERRITORIAL, AND LOCAL STATUTES IMPLICATING THE RIGHT TO REMAIN SILENT

Alabama

Ala. Code § 15-5-30 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")[1]

Arkansas

Ark. Code Ann. § 5-71-213 (providing that element of loitering is "refus[al] to identify [one]self and give a reasonably credible account of [one's] presence and purpose.")

California

Cal. Penal Code § 647(e) (providing that element of disorderly conduct is "refus[al] to identify [one]self . . . and to account for [one's] . . . presence when requested by any peace officer so to do. . . . ")[2]

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[1] The use of the word "demand" in this and similar statutes should not be taken lightly. As the police officers argued in *Henes v. Morrissey*, 533 N.W.2d 802, 807-08 (Wis. 1995), "the word 'demand' . . . presumes a consequence for refusing to produce identification upon their 'demand' for it during a lawful investigatory stop. The consequence . . . is arrest for obstruction under [the obstruction statute]." Although the Wisconsin court rejected this reasoning, Nevada and other states have not.

[2] Although this Court held the California statute unconstitutionally vague in *Kolender v. Lawson*, 461 U.S. 351 (1983), it has never been amended or repealed, and was recently cited in *People v. Ashton*, 2003 WL 22708680 (Cal. Ct. App. Nov 18, 2003).

Delaware

Del. Code Ann., tit. 11, § 1321(6) (providing that where loitering is suspected, police officer may "request[ ] identification and an explanation of the person's presence and conduct.")

Del. Code Ann., tit. 11, § 1902 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad and destination," and adding that "[a]ny person so questioned who fails to give identification or explain [his] actions to the satisfaction of the officer may be detained and further questioned and investigated" for up to two hours).

Florida

Fla. Stat. Ann. § 856.021 (providing that where loitering is suspected, police officer may request the person "to identify himself . . . and explain his . . . presence and conduct," and may take into consideration the person's "refus[al] to identify himself" in determining whether loitering has occurred.)

Fla. Stat. Ann. § 901.151(2) (providing that a police officer is entitled to ascertain a *Terry* suspect's "identity . . . and the circumstances surrounding [his] presence abroad. . . . ")

Georgia

Ga. Code Ann. § 16-11-36 (providing that where loitering is suspected, police officer may "request[ ] the person to identify himself and explain his presence and conduct," and may take into consideration the person's

"refus[al] to identify himself" in determining whether loitering has occurred).

Guam

8 Guam Code Ann. §§ 30.10, 30.20 (providing that a peace officer may detain a person "under circumstances which reasonably indicate that such person has committed, is committing or is about to commit a criminal offense" for the purpose of "ascertaining the identity of the person detained and the circumstances surrounding his presence abroad. . . . ," but adding that "such person shall not be compelled to answer any inquiry of the peace officer.")

9 Guam Code Ann. § 61.30 (providing that where loitering is suspected, police officer may request the person to "identify himself and explain his presence and conduct," and may take into consideration the person's "refus[al] to identify himself" in determining whether loitering has occurred).

Illinois

725 Ill. Comp. Stat. 5/107-14 (providing that a police officer "may demand" a *Terry* suspect's "name and address . . . and an explanation of his actions.")

Illinois: Chicago

Chicago, IL, Mun. Code § 2-84-310 (providing that a police officer "may stop any person in a public place whom the officer reasonably suspects is committing, has committed or is about to commit a criminal offense under the law of the State of Illinois or a violation of Chapter 8-20 of this

Code [re: weapons], and may demand the name and address of such person and an explanation of his actions.")

Kansas

Kan. Stat. Ann. § 22-2402(1) (providing that a police officer "may demand" a *Terry* suspect's "name, address . . . and an explanation of such suspect's actions.")

Louisiana

La. Code Crim. Proc. Ann. art. 215.1(A) (providing that a police officer "may demand" a *Terry* suspect's "name, address, and an explanation of his actions.")

Massachusetts

Mass. Gen. Laws, ch. 41, § 98 (providing that police officers "may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going," and adding that "[p]ersons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police. . . . ")

Minnesota: St. Paul

St. Paul, MN, Legis. Code § 225.11 (providing that a "peace officer may stop any person abroad in a public space whom he has reasonable grounds to believe is committing, has committed or is about to commit a felony or any crime or offense involving the use of a weapon of any kind, and may demand of him his name, address, and an explanation of his actions.")

Missouri: Kansas City

Mo. Ann. Stat. § 84.710 (Vernon's) (in a statute setting forth the powers to arrest of police officers in Kansas City, providing that those officers have the "power to . . . demand" a *Terry* suspect's "name, address, business abroad and whither he is going.")

Montana

Mont. Code Ann. § 46-5-401(2)(a) (providing that a police officer is entitled to "request" a *Terry* suspect's "name and present address and an explanation of the person's actions. . . . ")

Nebraska

Neb. Rev. Stat. § 29-829 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

New Hampshire

N.H. Rev. Stat. Ann. § 594:2 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad and where he is going.")

N.H. Rev. Stat. Ann. § 644:6 (providing that where loitering is suspected, police officer may request the person to "identify himself and give an account for his presence and conduct," but adding that "[f]ailure to identify or account for oneself, absent other circumstances, however, shall not be grounds for arrest.")

New Mexico

N.M. Stat. Ann. § 30-22-3 (providing that it is a misdemeanor to "conceal[ ] one's true name or identity, or disguis[e] oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder, or interrupt any public officer . . . in a legal performance of his duty. . . . ")[3]

New York

N.Y. Crim. Proc. Law § 140.50(1) (McKinney's) (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his conduct.")

North Dakota

N.D. Cent. Code § 29-29-21 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

Rhode Island

R.I. Gen. Laws § 12-7-1 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad, and destination" and adding that "any person who fails to identify himself . . . and explain his . . . actions to the satisfaction of the peace officer may be further

[3] New Mexico has approved the use of this statute to convict a person who delays in providing his name to an investigating officer. *State v. Dawson*, 983 P.2d 421, 423 (N.M. Ct. App. 1999). The *Dawson* court held that Section 30-22-3 "requires a person to furnish identifying information immediately upon request . . . ," and rejected the defendant's Fourth Amendment arguments. *Id.* at 424.

detained and further questioned and investigated" for up to two hours.)

Utah

Utah Code Ann. § 77-7-15 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

Vermont

Vt. Stat. Ann. tit. 24, § 1983 (providing that a law enforcement may detain a person if "(1) the officer has reasonable grounds to believe the person has violated a municipal ordinance; and (2) the person refuses to identify himself . . . satisfactorily to the officer when requested by the officer," and adding that: "If the officer is unable to obtain the identification information, the person shall forthwith be brought before a district court judge for that purpose. A person who refuses to identify himself . . . to the court on request shall immediately and without service of an order on the person be subject to civil contempt proceedings. . . . ")

Virgin Islands

14 V.I. Code Ann. § 1191(1) (providing for up to a $5,000 fine and 90 days imprisonment for one who "loiters, remains or wanders in or about a public place without apparent reason and under circumstances which reasonably justify suspicion that he may be engaged in or about to engage in crime, and, upon inquiring by a police officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.")

Virginia: Arlington County

Arlington County (Va.) Code § 17-13 (providing that it "shall be unlawful for any person at a public place or place open to the public to refuse to identify himself by name and address at the request of a . . . police officer . . . , if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification.")

Wisconsin

Wis. Stat. Ann. § 968.24 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of [his] conduct.")